Supreme Court, U.S.
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No. 01-1763

IN THE

Supreme Court of the United States

CALIFORNIA INTERSCHOLASTIC FEDERATION and CALIFORNIA INTERSCHOLASTIC FEDERATION SOUTHERN SECTION,

Petitioners,

v.

VICTOR BARRIOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
I. Statutory Provisions Involved	1
II. Statement of the Case	1
A. This Is An Inappropriate Case For Clarifying *Buckhannon*, The Only Issue For Which Certiorari Is Sought.	1
B. Petitioners Mischaracterize Facts That Are Not, In Any Event, Relevant.	3
III. There Is No Sound Basis For Granting Certiorari.	5
A. This Case Presents An Inappropriate Vehicle To Clarify *Buckhannon* Due To Its Unusual Procedural Background And Reliance On Multiple Grounds Of Recovery, Not Challenged By Petitioners.	5
B. Mr. Barrios Has Separate State Law Grounds Entitling Him To Attorneys' Fees, Which Are Not Challenged By Petitioners.	7
C. The Decision Below Raises No Important Question Meriting Supreme Court Review And Will Impact A Very Small Class Of Cases.	9

Contents

Page

D. The Decision Below Is Consistent With All Circuits That Have Considered *Buckhannon*, Including The Ninth Circuit. 10

IV. Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

American Disability Association v. Chmielarz,
289 F.3d 1315 (11th Cir. 2002) 11

Barrios v. California Interscholastic Federation,
277 F.3d 1128 (9th Cir. 2002) 11

Beaty v. BET Holdings, Inc.,
222 F.3d 607 (9th Cir. 2000) 8

Bennett v. Yoshina,
259 F.3d 1097 (9th Cir. 2001) 12

Brickwood v. U.S.,
288 F.3d 1371 (Fed. Cir. 2002) 11

Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources,
532 U.S. 598 (2001) ..... *passim*

Center for Biological Diversity v. Norton,
262 F.3d 1077 (10th Cir. 2001) 11

Chambers v. Ohio Department of Human Services,
273 F.3d 690 (6th Cir. 2001) 11

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 7

Cited Authorities

Page

Farrar v. Hobby,
506 U.S. 103 (1992) 9

Flannery v. California Highway Patrol,
61 Cal. App. 4th 629 (1998) 8

Folsom v. Butte County Association of Governments,
32 Cal. 3d 668 (1982) 8

Johnson v. ITT Aerospace/Communications, Inc.,
272 F.3d 498 (7th Cir. 2001) 11

Johnson v. Rodriguez,
260 F.3d 493 (5th Cir. 2001) 10

Labotest v. Bonta,
__ F.3d __, 2002 WL 1586904 (9th Cir. 2002) .. 12

Mangold v. California Public Utilities Commission,
67 F.3d 1470 (9th Cir. 1995) 7

New England Regional Council of Carpenters v. Kinton,
284 F.3d 9 (1st Cir. 2002) 10

New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Commission,
272 F.3d 154 (2d Cir. 2001) 10

Cited Authorities

	Page
Oil, Chemical and Atomic Workers' International Union, AFL-CIO v. Department of Energy, 288 F.3d 452 (D.C. Cir. 2002)	11
Perez-Arrellano v. Smith, 279 F.3d 791 (9th Cir. 2002)	12
Reimer v. Champion Healthcare Corporation, 258 F.3d 720 (8th Cir. 2001)	11
Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002)	10
United States v. Campbell, 291 F.3d 1169 (9th Cir. 2002)	12
Statutes and Codes:	
Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1999)	1
California's Disabled Persons Act, Cal. Civ. Code § 54 *et seq.*	1, 8
California's Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.*	1
Rehabilitation Act of 1974, 29 U.S.C. § 794	1

I. Statutory Provisions Involved

While petitioners seek review only of the appellate court's decision that Respondent Victor Barrios was entitled to fees under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1999), Mr. Barrios also brought claims under analogous federal and state anti-discrimination statutes:

- Rehabilitation Act of 1974, 29 U.S.C. § 794;
- California's Disabled Persons Act, Cal. Civ. Code § 54 *et seq.*; and
- California's Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.*

The court held that Mr. Barrios was independently entitled to fees under the federal statutes and the state statutes, over which the trial court was compelled to exercise supplemental jurisdiction. Each ruling, including the finding of supplemental jurisdiction, would have to be reversed in order to change the mandate of the opinion below. An affirmance on any one of the other issues would make any further explication of *Buckhannon* dictum.

II. Statement of the Case

A. This Is An Inappropriate Case For Clarifying *Buckhannon*, The Only Issue For Which Certiorari Is Sought.

The history of this case makes it an inappropriate vehicle to clarify or extend the Court's ruling in *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health*

and Human Resources, 532 U.S. 598 (2001). Petitioners, not surprisingly, have limited any discussion of the procedural background.

In March 2000, the parties reached a settlement agreement that required payment of $10,000 in compensatory damages to Mr. Barrios and directed that Mr. Barrios "be allowed to coach baseball on the field, absent a material change in his ability to coach or in his wheelchair." Pet., App. B at 10a. The agreement bifurcated resolution of attorneys' fees from the substantive provisions of the settlement, reserving the issue of attorneys' fees "for the court to decide upon motion by any party." *Id.* On April 3, 2000, Mr. Barrios filed his motion for attorneys' fees. *Id.*

On May 16, 2000, after the fee motion was fully briefed, but before the court ruled on the fee motion, judgment was entered. The judgment provided:

> This Court *having reviewed the settlement agreement* between plaintiff Victor Barrios and defendants CIF and CIFSS and *being fully advised of the terms of that agreement* and *good cause* appearing therefor, IT IS ORDERED, ADJUDGED AND DECREED: Judgment is entered *according to the terms of the written settlement agreement*, attached hereto as Exhibit A.

See Id., (italics added).

After Mr. Barrios' fee motion had been fully briefed and nearly a month after judgment had been entered, petitioners moved to vacate the judgment on the grounds that they had

agreed to the settlement, but not to incorporation into a judgment. *Id.* On June 22, 2000, without a hearing, the district court granted petitioners' motion to vacate the judgment, over plaintiff's objection. Mr. Barrios acknowledged that there had been no explicit agreement either way as to whether the settlement would be incorporated into a judgment. He argued, however, that incorporation was appropriate because the damages had not yet been paid to plaintiff. *Id.* He argued, also unsuccessfully, that no good cause existed for allowing petitioners' untimely motion to vacate the judgment.

On August 2, 2000, the court entered its order denying plaintiff's motion for attorneys' fees and costs. Pet., App. B at 11a. Neither the court nor petitioners argued that the ruling to vacate the judgment had any effect on the court's findings with respect to fees.

On August 11, 2000, the court entered the parties' stipulation of dismissal. *Id.* The sole issue petitioners ask this Court to review, then, is the effect of what was a wholly fortuitous form of judgment, in a case with unusual circumstances not likely to be repeated.

B. Petitioners Mischaracterize Facts That Are Not, In Any Event, Relevant.

Petitioners mischaracterize two facts in an effort to engage the Court's sympathy. First, they inaccurately assign all blame for any discrimination to the umpires association. *See, e.g.*, Pet. at 2 ("Barrios . . . was not permitted by umpires . . . to coach from the field. . . ."; "Umpires were concerned that Barrios' unpadded wheelchair could be hazardous."; "[U]mpires were slow to respond to the decision by CIF."). The court of appeal, however, ruled that petitioners actively

participated in creating, interpreting and demanding enforcement of rules placing unnecessary conditions on Mr. Barrios, which operated to exclude him from coaching:

> On March 10, William R. Clark ("Clark"), *the CIFSS Assistant Commissioner*, wrote Kathleen Miller ("Miller"), the Principal of Westminster High School. *Clark* informed Miller that *the CIFSS* would permit Barrios to coach from the field, but only if "all exterior hard surfaces of his wheelchair shall be covered with 'no less than one-half inch thick, high density, closed cell polyurethane, or an alternate material of the same minimum thickness and similar properties.'" *The language quoted by Clark* came from a rule in the National Federation Football Yearbook that pertains to the padding of hard surfaces of football players' equipment. *Clark further suggested* that "this letter be kept with Coach Barrios to present to any officials challenging his status."

Pet., App. B at 6a (italics added).

Petitioners next erroneously state that they "voluntarily" complied with Mr. Barrios' request to return to coaching without unnecessary, restrictive conditions. This clumsy effort to portray this as a "catalyst" case is unavailing because, as the court of appeal held, petitioners did not, in fact, comply with anything until a written settlement was achieved:

> [T]he district court's finding that "the relief plaintiff sought for himself already had been granted prior to the filing of his complaint" is clearly erroneous. . . . Barrios had been subjected

> to discrimination on account of policies in effect prior to the initiation of litigation. Despite telling Barrios that he had been granted a "variance," the CIF refused to sign a legally binding agreement, and the discrimination continued. Only with a settlement agreement did Barrios obtain a legally enforceable right that ensured that promises made by the CIF effectively translated into nondiscrimination on the baseball diamond and in the coaching box.[1]

Pet., App. B at 16a.

Petitioners' misrepresentation of the facts cannot be credited. In any event, this is not a court of error, and petitioners are not seeking review on these issues.

III. There Is No Sound Basis For Granting Certiorari.

A. This Case Presents An Inappropriate Vehicle To Clarify *Buckhannon* Due To Its Unusual Procedural Background And Reliance On Multiple Grounds Of Recovery, Not Challenged By Petitioners.

The decision below does not lend itself to extending or clarifying the holding in *Buckhannon*.

When Mr. Barrios' fee motion was pending, there was in fact a judgment incorporating the terms of the settlement

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1. The record amply supports, and petitioners do not challenge, the appellate court's ruling that the district court's findings were "clearly erroneous."

agreement. Pet., App. B at 10a. It was only after an untimely motion to vacate the judgment was granted that the trial court ruled on the fee motion, and it neither discussed nor requested authority on the effect of what may have, in the interim, become an out-of-court settlement. Indeed, at the time of the fee ruling, what form the final order might take was an open question. It was the concern that a district court might not have reviewed the merits of a settlement that lay at the core of *Buckhannon*'s suggestion that the finding that a party was "prevailing" might not be suitable where an out-of-court settlement is reached. *Buckhannon*, 532 U.S. at 604 n.7. Here, there was no such danger because the court had previously reviewed and approved the settlement agreement, and vacated the judgment for reasons unrelated to the merits.

Moreover, the ruling vacating the judgment could have been, if the potential effect had been known, the subject of a motion to reconsider and, if denied, raised on appeal. At that time, however, vacating the judgment had no impact on the question of attorneys' fees, *see Buckhannon*, 532 U.S. at 603 and n.5, making an appeal of the ruling irrelevant or even frivolous. It is possible that the district court would have ruled differently had it known the effect of vacating the judgment would be to deny the possibility of a fee on grounds neither party nor the court contemplated. To not do so would have raised serious questions of equity.

Each of these circumstances make this case an inappropriate vehicle for a clear and broadly applicable Supreme Court opinion on fee awards. If there were agreement among a majority of the Court to extend the *Buckhannon* rationale to out-of-court settlements, it should be addressed in a case where, consistent with the purported rationale for such a change, the trial court has not intimately

reviewed the settlement and where the parties have briefed and addressed the relevant legal questions from the beginning. This is not such a case.

B. Mr. Barrios Has Separate State Law Grounds Entitling Him To Attorneys' Fees, Which Are Not Challenged By Petitioners.

Equally problematic, in terms of granting certiorari, is the fact that the attorneys' fees were awarded pursuant to state statutes as well as the federal statutes discussed in *Buckhannon*.

In addition to its analysis of Mr. Barrios' entitlement to attorneys' fees under his federal claims (Pet., App. B at 11a-17a), the appellate court ruled that Mr. Barrios was entitled to attorneys' fees under his supplemental state claims. Pet., App. B at 17a-20a. Even if this Court were to rule that *Buckhannon* precluded an award of fees under the federal statutes in this case, it would not preclude an award of attorneys' fees under California statutes and, therefore, not change the result.

The federal courts look to California law to determine entitlement to fees under California statutes. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Mangold v. California Public Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) ("In construing a state law, we follow the decisions of the state's highest court."). California courts have repeatedly held that California fee-shifting statutes do not automatically apply federal attorneys' fees jurisprudence, but make an independent determination of California law:

> [O]ur high court has made clear that federal law construing comparable [fee-shifting] statutes is

> not controlling. . . . "Federal decisions rest in part on evidence of congressional intent . . . for which there is no California parallel. *We envision an independent state rule.*"

Flannery v. California Highway Patrol, 61 Cal.App.4th 629, 632, 640 (1998) (quoting *Serrano v. Unruh*, 32 Cal.3d 621, 625 n.6 (1982)) (emphasis and second ellipsis in *Flannery*); *see also Beaty v. BET Holdings, Inc.*, 222 F.3d 607, 611 n.1 (9th Cir. 2000) ("California's law of attorney's fee awards under the FEHA has diverged from federal law as developed under civil rights fee-shifting statutes.").

Applying California law, the appellate court ruled that Mr. Barrios is entitled to fees under his state claims.[2] Pet. at 17a-20a. The California Supreme Court has long held that a plaintiff may "prevail" when he obtains a legally enforceable settlement agreement. *See Folsom v. Butte County Assn. of Governments*, 32 Cal.3d 668, 685-86 (1982).

There has been no determination by the California courts, and indeed, no suggestion, that California would extend the holding of *Buckhannon* to out-of-court settlements, even if it were to find it persuasive with respect to the catalyst theory — itself improbable. Thus, the decision below that Mr. Barrios was entitled to attorneys' fees is independently supported by application of state law.

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2. Because the appellate court concluded that Mr. Barrios was entitled to attorneys' fees under California Civil Code section 55, it did not reach the question of entitlement to fees under Mr. Barrios' other state statutory claims (Pet., App. B at 19a), leaving open additional questions that make this case an inappropriate vehicle for the Court's review.

The presence of state law grounds under supplemental jurisdiction — a question not raised by petitioners in their writ — is yet another reason this would be an inappropriate vehicle to clarify or extend *Buckhannon*.

C. The Decision Below Raises No Important Question Meriting Supreme Court Review And Will Impact A Very Small Class Of Cases.

Petitioners strain to present an "important question." They urge this Court to rectify an alleged "inconsistency" between the unavailability of fees in a catalyst case where "broad policy change" may be achieved and the availability of fees in a case with an enforceable "minimal" private settlement agreement. Pet. at 11-12.

This is a false inconsistency. A catalyst case may involve "minor" results and a private settlement agreement may involve "major" changes benefiting the public. More importantly, this issue was long ago resolved by the Court in *Farrar v. Hobby*, 506 U.S. 103, 114-15 (1992) (holding that prevailing party who achieves nominal or *de minimis* victory may not be entitled to fees). The petition presents no important question.

Because of the unique procedural history, the court of appeal's opinion below will be very limited in its application to future cases. The circumstances that arose in this case — a settlement agreement first incorporated in a judgment, then taken out by an untimely motion, where neither the court nor the parties addressed the concerns raised in *Buckhannon* — is unlikely to recur.

The bifurcation of fee issues and merits is also comparatively rare, and presents issues that are not present when the district court has not overseen any aspect of the settlement process and may not have jurisdiction to enforce the agreement.

The small class of cases affected by a ruling in this matter does not warrant review by an overburdened Court.

D. The Decision Below Is Consistent With All Circuits That Have Considered *Buckhannon*, Including The Ninth Circuit.

Petitioners seek, unsuccessfully, to portray a circuit split between the case below and other cases that have applied *Buckhannon*. This is not the case. All circuits (including the Ninth Circuit) that have been presented with the issue have held that *Buckhannon* overruled the catalyst theory for recovering attorneys' fees under federal fee-shifting statutes. *See, e.g., New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (acknowledging that plaintiff's fee motion based on the catalyst theory was "thwarted" when the Supreme Court "recently consigned the catalyst theory to the scrap heap."); *New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Commission*, 272 F.3d 154, 158 (2d Cir. 2001) ("the Court concluded that the 'catalyst theory' was not a permissible basis for the award of attorney's fees"); *Smyth v. Rivero*, 282 F.3d 268, 275 (4th Cir. 2002) ("the Supreme Court specifically rejected the 'catalyst theory'"); *Johnson v. Rodriguez*, 260 F.3d 493, 495 (5th Cir. 2001) ("The Supreme Court has since rejected reliance on the 'catalyst theory' as a basis for awarding attorney's fees under fee-shifting statutes authorizing awards to the 'prevailing

party.'"); *Chambers v. Ohio Dep't of Human Services*, 273 F.3d 690, 692 (6th Cir. 2001) ("the Court categorically rejected the catalyst theory as a permissible basis for awarding attorney's fees."); *Johnson v. ITT Aerospace/ Communications, Inc.*, 272 F.3d 498, 500 (7th Cir. 2001) ("The Supreme Court has rejected the 'catalyst' ground for obtaining attorneys' fees under feeshifting provisions, such as that of Title VII, that limit the award of fees to a 'prevailing party' in the litigation."); *Reimer v. Champion Healthcare Corporation*, 258 F.3d 720, 727 (8th Cir. 2001) ("In *Buckhannon*, the Supreme Court reversed an award of attorney's fees under the catalyst theory. . . ."); *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) ("[In *Buckhannon*,] the Court concluded that the 'catalyst theory' — whereby a party is considered prevailing so long as he or she can prove that the pending litigation was a catalyst that brought about the policy change — is not a permissible basis for the award of attorneys' fees."); *Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) ("the Supreme Court recently held that the catalyst theory cannot be invoked to support an award of attorneys' fees"); *American Disability Association v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002) ("The Court invalidated the 'catalyst theory' because '[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.'"); *Oil, Chemical and Atomic Workers' International Union, AFL-CIO v. Department of Energy*, 288 F.3d 452, 454 (D.C. Cir. 2002) ("in *Buckhannon*, the Supreme Court rejected the 'catalyst theory'"); *Brickwood v. U.S.*, 288 F.3d 1371, 1376 (Fed. Cir. 2002) ("In *Buckhannon*, the Supreme Court rejected the use of the 'catalyst theory' in construing whether one is a 'prevailing party' under federal fee-shifting statutes such as the FHAA and the ADA.").

Despite this lengthy list of cases, petitioners cite only three cases that applied *Buckhannon*, without discussing their holdings. Pet. at 10-11. They simply allege, without support, that the opinion below "conflicts with virtually every appellate decision filed on the subject." Pet. at 11. The reality is, its central holding is consistent with all circuits that have applied *Buckhannon*. There is no split.

Contrary to petitioners' suggestion, the Ninth Circuit has consistently applied the decision in *Buckhannon*. *See Bennett v. Yoshina*, 259 F.3d 1097, 1101 (9th Cir. 2001) (denying plaintiffs attorneys' fees under the catalyst theory); *Perez-Arrellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (holding that *Buckhannon* precluded fee award under Equal Access to Justice Act, after INS voluntarily granted naturalization and case was dismissed); *United States v. Campbell*, 291 F.3d 1169, 1172 (9th Cir. 2002) (extending *Buckhannon* to "The Hyde Amendment," 18 U.S.C. § 3006A, and denying attorney's fees); *Labotest v. Bonta*, __ F.3d __, 2002 WL 1586904 (9th Cir. 2002) (finding fee award was appropriate under *Buckhannon* where stipulation granting plaintiff relief was incorporated into the court's final order, and settlement agreement was entered with approval by the court).

The Ninth Circuit has consistently followed and expanded upon *Buckhannon*.

IV. Conclusion

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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